PUBLIC PROSECUTOR

v.

WONG KIM FATT

HIGH COURT MALAYA, JOHOR BAHRU
GEORGE SEAH FJ
[CRIMINAL TRIAL NO. 6 OF 1982]
23 JANUARY 1983

CRIMINAL PROCEDURE: *Criminal breach of trust - Servant - Falsification of bills - Dominion over fees and money received in such capacity - Meaning of "dishonesty" - Meaning of "wilful" - Intent to defraud - Intention to wrongfully deprive owner of property - Actuated by dishonest intention - Meaning of "falsify"- Penal Code ss. 44, 408, 409, 477A.*

LEGAL PROFESSION: *Whether salaried partner - Employee - Legal firm - Service agreement - Authorised to operate and manage bank accounts and to raise and reduce professional bills.*

PARTNERSHIP: *Whether salaried partner - Employee - Legal firm - Service agreement - Authorised to operate and manage bank accounts and to raise and reduce professional bills.*

The accused was charged for criminal breach of trust by a servant under s. 408 of the Penal Code of a sum of RM16,000 between 5 July 1976 and 14 April 1977 at the office of Allen & Gledhill, OCBC Building, Jalan Ibrahim, Johor Bahru. The alternative charge against the accused was for falsification of bills no. 414 (the said bill), an offence punishable under s. 477A of the Penal Code. The question in this case was whether the accused was an employee of Allen & Gledhill or a partner during the said period.

The accused first joined Allen & Gledhill, Johor Bahru as a legal assistant for an initial period of three years and four months commencing from 1 September 1970 to 31 December 1973. Under the terms of this agreement the accused was to be paid by way of remuneration. The accused continued as a legal assistant until he left the firm on 31 October 1981.

The prosecution contended that the accused was never a partner of Allen & Gledhill or the Johor Bahru Branch Office of Allen & Gledhill at any time or in the years 1976 and 1977. For this reason, the name of the accused was not mentioned as a partner in the 1976 nor 1977 annual of Allen & Gledhill, Malaysia. Also in the 1976 and 1977 annual of Allen & Gledhill, Johor Bahru the position of the accused was therein described as "manager" in charge of the branch office. Moreover, in the 1975/1976 solicitors' indemnity policies accused was not described therein as a partner. Further, on the retirement of one of the partners from Allen & Gledhill on 30 June 1976 notices were sent out to the various banks as to who the present partners were and the accused was nowhere mentioned.

The accused contended that when the accused was working under service agreement he was authorised to operate and manage the bank accounts of the branch office. These accounts included both the office and clients' accounts. Besides, operating these bank accounts it was common ground that the accused was empowered to sign cheques and to withdraw moneys from the banks. In addition to taking charge of the branch office at Johor Bahru and operating the bank accounts, the accused was given full authority to raise bills, reduce bills and to amend them as necessary.

To summarise, the defence of the accused was:

(a) that he was made a partner of the Johor Bahru Branch Office with effect from 1 January 1974 by the late Hoffman (a partner) and that he remained a partner until his retirement on 31 October 1981;

(b) that all the three withdrawals of RM10,000, RM3,000 and RM1,500 for agreed disbursements were approved by the late Hoffman;

(c) that the withdrawal of RM1,000 in bill no. 451 of 1976 was in connection with his legitimate claim for transport and outstation allowances, and

(d) that all these four withdrawals were made openly and there was no concealment or secrecy about them. As such, there was no dishonest misappropriation of them.

Held:

[1] The Court was satisfied beyond reasonable doubt that the accused at all material times, was employed as a servant by Allen & Gledhill, Johor Bahru. On the evidence, the Court was also satisfied that as from 1 January 1972 onwards the accused was regarded by his employer as a "salaried partner".

[2] The Court was also satisfied beyond reasonable doubt that when the accused received the professional fees paid by S1 Co., S2 Co., J Co., and T Co., *vide* bill no. 414 of 1976, bill no. 45l of 1976, bill no. 673 of 1976 and bill no. 152 of 1977 he received them on behalf of the firm for a specific purpose, *viz*. to discharge expenses incurred by the branch office and after deducting his share of the nett profit to pay the balance to the partners in Kuala Lumpur together with the statement of accounts for the month. Furthermore, the prosecution had also proved beyond reasonable doubt that the entrustment was his capacity as a servant, employee or salaried partner of the branch office in the years 1976 and 1977 respectively and that during these periods, the accused had dominion over all the fees or moneys received by him in such capacity.

[3] On the evidence the prosecution had proved beyond reasonable doubt that although PW11 typed all the original and substituted bills herein it was the accused who prepared them. Besides, the accused also signed on all the original and substituted bills and the partners did not receive the first copy or duplicate copy of the substituted bills. These bills were however paid as evidenced by the clients' ledger, clients' cash book and the bills book respectively.

[4] The defence's contention that the substituted bills were typed at the same time as the original bills was not established beyond reasonable doubt. It has been proved that the substituted bills referred were typed after the clients had settled the original bills of the professional charges.

[5] The prosecution had proved beyond reasonable doubt that the accused had misappropriated a total sum of RM15,500 and that the misappropriation was actuated by dishonest intention which was the subject of the amended first principal charge.

[6] To establish dishonesty, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for one's own benefit for a time may be sufficient. It is not necessary to prove in what precise manner the money or property was misappropriated. The essential thing to be proved is that the accused was actuated by dishonest intention. The failure of the accused to

account for the money proved to have been received by him or giving a false account as to its use is generally a strong circumstance against the accused. The mental act of intent to deprive the owner of his property is the gist of the offence.

[7] Since it had been established by the prosecution that the substituted bills were a devise designed by the accused to withdraw money from the clients' account which rightfully belonged to the firm for illegitimate purposes and without having to account for it in the monthly statements of accounts sent to the partners in Kuala Lumpur there was ample evidence where the Court could infer that the misappropriation was deliberate and dishonest. The prosecution had proved beyond reasonable doubt that the misappropriation was actuated by dishonest intention.

[8] As to the alternative charge of falsification of bill no. 414 of 1976 under s. 477A of the Penal Code, the Court was satisfied beyond reasonable doubt that the prosecution had established that:

(a) at the relevant time, the accused was employed as a servant of Allen & Gledhill.

(b) that acting in that capacity he falsified bill no. 414 of 1976 which was in the possession of his employer in Johor Bahru. It is not necessary for the prosecution to prove that any person or persons were actually deceived by the false document. It is quite sufficient if in the opinion of the Court the document had that tendency. The expression "falsify" applies to the preparation of an entirely new document containing false information. To falsify means to render false a new document containing false information that can be correctly described as a false document and the act of preparing such a document is falsification of the document.

(c) that he did so wilfully and with intent to defraud. "Wilfully" as used in s. 477A means "intentionally" or "deliberately" and on the evidence produced by the prosecution, there was ample evidence for me to hold that the substituted bill no. 414 of 1976 was made by the accused intentionally, deliberately and wilfully. The accused was called upon to enter his defence on the amended first principal charge as well as the alternative charge.

[9] The Court rejected the defence of the accused in respect of the amended first principal charge and the alternative charge as the story of the accused was not a reasonable or probable one, having regard to the facts of this case and the Court found the accused guilty as charged on the amended first principal charge only and convicted him.

[10] The partners in Kuala Lumpur would never include the name of the accused as a partner when he was not one at all. This is a reasonable inference to draw in view of the special circumstances of the case and the accused deliberately misled and induced the partners in Kuala Lumpur to sign both the application form. On the evidence it is clear that the accused inserted his name as a partner of Allen & Gledhill and put his personal signature to the application form without the knowledge and consent of the partners of the firm in Kuala Lumpur. If the accused was not a partner in law and in fact, the fact that he had induced the partners in Kuala Lumpur to sign the application forms to make it appear that he was a partner would not *ipso facto* turn him into a partner-in-law. The act of the accused was well-planned and calculated.

[11] It has long been established that a person who is not a partner became liable as if he were a partner to people to whom he so conducts himself as to lead them to act upon the supposition that he is a partner in point of fact. This doctrine is nothing more than an

illustration of the general principle of estoppel by conduct. The doctrine of holding out applies in favour of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it. The doctrine is entirely misapplied when it is extended beyond the principle on which it rests. It cannot apply in a criminal case to prove that the person held out is in fact a partner to enable him to escape criminal liability arising out of his true position as a servant.

[Accused found guilty and convicted.]

Cases referred to:
Hewitt v. Bonvin [1940] 1 KB 188 ***(cit)***
Mersey Dock & Harbour Board v. Coggins & Griffin (Liverpool) Ltd. [1947] AC 1 ***(cit)***
Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property [1954] AC 584 ***(cit)***
Shecharanlal v. Emperor [1936] 37 Cr LJ 856 ***(foll)***
Sathiadas v. PP [1970] 2 MLJ 243 ***(cit)***
Mohamed Adil v. PP [1967] 1 MLJ 151 ***(cit)***
S. Harnam Singh v. The State Delhi Admin. [1976] SC Cr LJ 913 ***(cit)***
Ra, Chang Gurvala & Ors. v. King-Emperor [1926] AIR Lahore 385 ***(foll)***

Legislation referred to:
Penal Code, ss. 24, 44, 408, 409, 477A

Other sources referred to:
Gour's Penal Law of India 8th Edn., Vol. 4
Halsbury's Laws of England 4th Edn., Vol. 35 para. 14

For the Public Prosecutor - Mokhtar Abdullah, Senior Federal Counsel
For the accused - R.R. Chelliah, leading Counsel, assisted by Devi Saraswathy

[**Editor's Note:** The accused's appeal to the Federal Court as it then was *vide* Federal Court Criminal Appeal No. 6-1983 against conviction and sentence was dismissed on 19 April 1983.]

JUDGMENT

George Seah FJ:

In this case, the accused, Wong Kim Fatt, was originally charged with three principal counts of criminal breach of trust by a servant under s. 408 of the Penal Code and three alternative counts of falsification of bills by a servant under s. 477A of the same Code. Before the commencement of the trial and on the application of Senior Federal Counsel I ordered that the second and third principal and alternative charges be stayed and that only the first principal and alternative charges be proceeded with.

The first principal charge reads:

> That you, between 5 July 1976 and 14 April 1977 at the office of Allen & Gledhill, Overseas-Chinese Banking Corporation Building, Jalan Ibrahim, in the District of Johor Bahru, in the state of Johor, being a servant in the employment of Allen & Gledhill, and in such capacity entrusted with dominion over certain property, to wit, a sum of RM16,000 committed criminal breach of trust in respect of the said property, and that you thereby committed an offence punishable under s. 408 of the Penal Code.

The alternative charge reads as follows:

> That you, on or about 22 June 1976, at the office of Allen & Gledhill, Oversea-Chinese Banking Corporation Building, Jalan Ibrahim, in the District of Johor Bahru, in the state of Johor, being a servant in the employment of Allen & Gledhill, wilfully and with intent to defraud, falsified a bill no. 414 of 1976 raised by the Johor Bahru office of the said Allen &

Gledhill to Soga Berhad, Batu Pahat, which was in the possession of the said Allen & Gledhill, your employer, and that you thereby committed an offence punishable under s. 477A of the Penal Code.

The accused pleaded not guilty to both the principal and alternative charges. He was defended by leading Counsel, Mr. Robert Chelliah and assisted by Miss. Devi Saraswathy while Senior Federal Counsel, Encik Mohtar Abdullah appeared for the prosecution.

Following a complaint lodged by Mr. Chin Yew Meng (PW9) a partner of Allen & Gledhill, Kuala Lumpur on 28 April 1982 (Ex. P25) investigations were carried out by the police resulting in this prosecution.

A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done (*Hewitt v. Bonvin* [1940] 1 KB 188). However, there are many contracts in which the master does not or cannot control the way in which the work is done: the captain of a ship and house surgeon at a hospital are each under a contract of service but each would greet with some astonishment a direction from his employers stating how a particular task was to be performed. Indeed, in many cases the employer lacks the technical skill necessary to give such a direction. Even though he may have the skill, the employer may not have the time. And an employer may well be unable or unwilling to give specific orders to a skilled or professional man, thinking it best to allow him to carry out the task in his own way but that will not relieve the employer from liability. As was pointed out by Lord Porter in *Mersey Docks and Harbour Board v. Coggins & Griffin (Liverpool) Ltd.* [1947] AC 1 at p. 17:

...the ultimate question is not what specific orders, or whether any specific orders were given but who is entitled to give the orders as to how the work should be done.

The skilled or professional employee may retort:

I take no orders from anybody

That as Lord Simonds remarked was:

...a sturdy answer which meant that he was a skilled man and knew his job and would carry it out in his own way. Yet ultimately he would decline to carry it out in the appellant's way at his peril, for in their hands lay the sanction, the power of dismissal

Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property [1954] AC 584.

The accused first joined Allen & Gledhill, Johor Bahru as a legal assistant for an initial period of three years and four months commencing from 1 September 1970 to 31 December 1973 (Ex. P29). Under the terms of this agreement the accused was to be paid by way of remuneration in the manner following, *viz*:

(a) RM1,600 pm. ... from 1 January 1970 to 31 December 1970;

(b) RM1,750 pm. ... from 1 January 1971 to 31 December 1971; and

(c) RM1,600 pm. ... from 1 January 1972 to 31 December 1973 plus

20% of the Johor Bahru nett profit, each payment to be made on the last day of each calender month.

It was the case of the prosecution that after the expiration of the service contract by effluxion of time on 31 December 1973 the accused continued as a legal assistant until he left the firm on 31 October 1981 to take up the appointment of a Judicial Commissioner on a fixed term. According to Mr. Chin Yew Meng (PW9) a partner of Allen & Gledhill, the firm employs two types of legal assistants. In the first category, the legal assistant is paid a fixed monthly salary plus a bonus at the end of each completed year of satisfactory service. In the second category, the legal assistant receives a fixed monthly salary and a share of the nett profit of the office in which he works in. The accused comes within the second category and it has been the practice of the firm to regard the second category of legal assistant as a "salaried partner", albeit he is in law an employee of the firm. In *Halsbury's Laws of England* (4th Edn.,) Vol. 35 para.. 14 at p. 11 the following passages appear:

> The expression "salaried partner" is not a term of art, but is generally used to mean a person who receives a fixed remuneration irrespective of profits and who is held out to the world to be a partner (see *Stekel v. Ellice* [1973] 1 All ER 465 or 1 WLR 191 and *Turnock v. Taylor* [1961] 180 Estates *Gazette* 773). The partnership will then be bound by his acts. His salary may be a charge on the profits. Where a person receives both salary and a share of the profits, it is strong evidence that he is an employee rather than a partner.

In support of these contentions the prosecution had adduced the undermentioned documentary evidence, *viz*:

(a) The service agreement dated 25 May 1970 where the accused was employed as a legal assistant by Allen & Gledhill for a period of three years and four months ending on 31 December 1973 (Ex. P29(b)). On taking up the employment the accused took charge of the branch office of Allen & Gledhill at Johor Bahru. On the expiration of the service agreement the accused continued in his employment at the branch office and on 1 December 1974 he wrote a letter addressed to the precedent partner of Allen & Gledhill, Mr. R.C. Hoffman and the relevant parts read:

> May I write to you about my arrangement with the firm. My original service contract ... expired on 31 December 1973 and since then for the whole of 1974 I have been working practically on the old terms ... I am now getting RM1,500 as salary plus 25% on the nett profit of Johor Bahru office. ... (Ex. P30(c)).

In 1976 the accused was paid a monthly salary of RM1,600 plus 30% of the nett profit of the Johor Bahru office and as from 1 January 1977 the percentage was raised to 45% (Ex. P30(d)), Ex. P30(f), and Ex. P24 (a to d).

(b) Employees Provident Fund returns for the half year ending June 1976 (Ex. P27(a)) and for the half year ending December 1976 (Ex. P27(b)) duly signed by Allen & Gledhill, Johor Bahru as employer, showed that the accused was one of the employees who contributed to the said fund. However, for the half year ending June 1977 (Ex. P27(c)) the return showed that the accused only made one contribution for the month of January 1977 and that he made no further contribution after that date (Ex. P28). The office of the Employees Provident Fund had not received any notification why the accused ceased contributing after January 1977. However, the returns of income from employment for the year ending 31 December 1976 (Ex. P36) and for the year ending 31 December 1977 (Ex. P37) duly signed by Allen & Gledhill, Johor Bahru as employer showed that the accused, Wong Kim Fatt, was an employee for the years 1976 and 1977. It was not in dispute that the employer's signature was that of the accused.

(c) In his report to the police lodged on 28 April 1982, Chin Yew Meng, a partner of Allen & Gledhill, stated that the accused, Wong Kim Fatt was "a salaried partner up till that time when he left my branch office" (Ex. P25).

(d) In his statement to the police made on 2 July 1982 (which had been conceeded by defence Counsel to have been made voluntarily and was therefore admitted without any objection) the accused admitted that he became a salaried partner of the Johor Bahru branch office in 1972 (Ex. P26).

It was the case of the prosecution that the accused was never a partner of Allen & Gledhill or the Johor Bahru branch office of Allen & Gledhill at any time or in the years 1976 and 1977. For this reason, the name of the accused was not mentioned as a partner in the 1976 annual accounts (Ex. P31) and the 1977 annual accounts (Ex. P32) of Allen & Gledhill, Malaysia. In the 1976 annual accounts (Ex. P33) and the 1977 annual accounts (Ex. D6) of Allen & Gledhill, Johor Bahru the position of the accused was therein described as "manager" in charge of the branch office. Moreover, in the 1975/1976 and 1976/1977 solicitors' indemnity policies (Ex. P34 and P35) the accused was not described therein as a partner. And lastly, on the retirement of Henry B.H. Cheah from Allen & Gledhill on 30 June 1976 notices were sent out to Public Bank (Ex. P38(a)), Hong Kong & Shanghai Banking Corporation (Ex. P38(b)), Chung Khiaw Bank (Ex. P38(c)) and Oversea-Chinese Banking Corporation (Ex. P38(d)) all of Johor Bahru, informing them that Mr. R.C. Hoffman, Mr. Joseph K.S. Lai, Madam Thoo Chow Thye and Mr. Chin Yew Meng "are the present partners of this firm and have taken over the assets and liabilities of the partnership with effect from 1 July 1976" by the retiring partner. The name of the accused was nowhere mentioned.

On the evidence produced by the prosecution I am satisfied beyond reasonable doubt that the accused, Wong Kim Fatt, was at all material times, employed as a servant by Allen & Gledhill or Allen & Gledhill, Johor Bahru. On the evidence, I am also satisfied that as from 1 January 1972 onwards the accused was regarded by his employer as a "salaried partner".

Under cl. 5 of the service agreement (Ex. P29(b)):

> The assistant (accused) shall keep or cause to be kept all such accounts and records as are usual and proper to be kept by solicitors of all moneys paid and received in respect of any business or matters entrusted to him and all business transactions undertaken or transacted by the firm (Allen & Gledhill) under his management.

After the expiration of this service agreement by effluxion of time on 31 December 1973 the accused continued to be employed by and worked for Allen & Gledhill as a legal assistant, albeit the firm seemed to regard him as a "salaried partner" and to use the expression of the accused "... since then and for the whole of 1974 I have been working practically on the old terms" (Ex. P30(c)). In *Shecharanlal v. Emperor* 37 Cr LJ [1936] 856 it was decided that where there is a contract of employment under certain terms, for a particular year, and the employment continues after the expiry of that year the ordinary presumption is that the same conditions also continue. In short, the accused considered himself to be bound by the terms and conditions of the service agreement insofar as the terms and conditions were relevant and applicable. When the accused was working under the service agreement he was authorised to operate and manage the bank accounts of the branch office. These accounts included both the office and clients' accounts. It was not disputed that when the accused joined the branch office on 1 September 1970 it operated three bank accounts at (i) Oversea-Chinese Banking Corporation, (ii) Hong Kong & Shanghai Banking Corporation and (iii) Public Bank.

However, in the year 1974 additional accounts were opened at (a) Malayan Banking and (b) Chung Khiaw Bank in Johor Bahru. Besides, operating these bank accounts it was common ground that the accused was empowered to sign cheques and to withdraw moneys from the banks. With the exception of Oversea-Chinese Banking Corporation it was expressly provided that any sum not exceeding RM200,000 "may be signed by any one of the four signatories and that any cheque exceeding RM200,000 must be signed by any two signatories" (Ex. D4). According to the accused he was put:

> ...in sole charge of the Johor Bahru branch of the firm with full authority to manage the branch and to spend any entertainment money or other expenses in the manner I considered best

(Ex. P26). In addition to taking charge of the branch office at Johor Bahru and operating the bank accounts, the accused was given full authority to raise bills, reduce bills or amend them as necessary. Now, it was common knowledge that the principal source of income of the branch office consisted of professional charges paid by the clients. When a cheque was received it would be deposited into the clients' account and after deducting disbursements and other legitimate claims the professional fee would or should be transferred to the office account. From the office account, the accused would draw cheques for payments of wages, EPF contributions, office expenses, transport and disbursements claims at the end of each month. The accused would also prepare a statement of accounts every month showing the total income of the branch office for the month and the estimated expenditure and nett profit. After deducting his share of the nett profit the accused would remit the balance to the partners of Allen & Gledhill in Kuala Lumpur together with copies of the statement of accounts for that month.

In the case of *Sathiadas v. PP* [1970] 2 MLJ at p. 243 Raja Azlan Shah J (as he then was) said:

> The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out ...

On the facts I am satisfied beyond reasonable doubt that when the accused received the professional fee paid by Soga Berhad, Swee Hoe Realty Sdn. Bhd., Johor Oil Palm Plantations Sdn. Bhd. and Textiles Corporation of Malaya Sdn. Bhd., *vide* bill no. 414 of 1976 (Ex. P7), bill no. 451 of 1976 (Ex. P9), bill no. 673 of 1976 (Ex. P6(a)) and bill no. 152 of 1977 (Ex. P8(a)) he received them on behalf of the firm for a specific purpose, *viz*. to discharge expenses incurred by the branch office and after deducting his share of the nett profit to pay the balance to the partners in Kuala Lumpur together with the statement of accounts for the month. Furthermore, the prosecution had also proved beyond reasonable doubt that the entrustment was in his capacity as a servant, employee or salaried partner of the branch office in the years 1976 and 1977 respectively. Moreover, I am satisfied beyond reasonable doubt that the accused during the periods abovementioned had dominion over all the fees or moneys received by him in such capacity.

I would now deal with the four bills raised by the accused for the years 1976 and 1977 against:

(a) Messrs. Soga Berhad, Batu Pahat	bill no. 414 of 1976
(b) Messrs. Swee Hoe Realty Sdn. Bhd.	bill no. 451 of 1976
(c) Messrs. Johor Oil Palm Plantations Sdn. Bhd. and	bill no. 673 of 1976
(d) Messrs. Textiles Corporation of Malaya Sdn. Bhd.	bill no. 152 of 1977

On 22 June 1976 the accused raised a bill no. 414 of 1976 against Soga Bhd., Batu Pahat for the total sum of RM122,764.20 made up of (a) RM16,000 for professional charges and (b) RM106,764.20 for disbursements. Stamp duty on transfer was stated to be RM84,437. This bill, like the others, was typed in Allen & Gledhill, Johor Bahru letterheads by Rosalind Koh (PW11) and it was signed by the accused. This bill was marked as Ex. P7 and hereinafter would be referred to as the original bill. It was common ground that three copies of the original bill were typed. The first copy was sent to Soga Bhd., the duplicate copy to be placed in clients' file and the third copy to be placed in the bills file.

It was the case of the prosecution that the accused also prepared another set of substituted bill no. 414 of 1976 against Soga Berhad for the same total sum claimed and also bearing the same date. This set of substituted bill contained substantially the same particulars as the original bill (Ex. P7) but there were two material differences in that (a) the amount of the professional charges was reduced to RM6,000 and (b) the amount of stamp duty on transfer under the disbursements column was increased by RM10,000 to RM94,437 with these extra words being typed in, *viz*: "and agreed disbursements." And on 5 July 1976 the accused made out a cash cheque for RM10,000 and withdrew this sum from the Oversea-Chinese Banking Corporation Clients' account *vide* cheque No. 886624 (Ex. P10). In the cheque but the following words were written therein: "To cash. Agreed disbursements, entertainment etc.," and the initial of the accused could also be seen (Ex. P10(a)). This withdrawal was entered in the clients' ledger at folio 12 with the words "To cash agreed disbursement" (Ex. P19) and in the clients' cash book folio 45 (Ex. P23) as well as in OCBC Account No. 2799 bank statement (Ex. P5(a)) and bank ledger (Ex. P14). It is pertinent to note that in the July 1976 statement of account sent to the partners of Allen & Gledhill in Kuala Lumpur, the accused claimed the following expenses for the month, *viz*:

(a) Transport	...	RM 400.00
(b) Entertainment	...	RM 691.11
(c) Disbursements	...	RM2,499.81

making a total of RM3,590.92 (Ex. P24(a)). However, entries at the office cash book folio 1 - 4 (Ex. P20) showed the undermentioned items, *viz*:

(a) Transport	-	RM 400.00
(b) Entertainment	-	RM 691.11
(c) Disbursements	-	RM1,467.16

making a total of RM2,558.27 only. The prosecution are not complaining about these discrepancies but with the withdrawal of RM10,000 from the clients' account. Apart from the writings in the cheque butt (Ex. P10(a)), clients' ledger (Ex. P19) and clients' cash book (Ex. P23) it was the contention of the prosecution that there was no voucher to support the expenditure of such a large sum of money by the accused. Besides, the accused also claimed allowances for transport, entertainment and disbursements during the month of July 1976 (Ex. P24(a). It would appear that the accused was making a double claim for the same expenses.

I would next deal with bill no. 451 of 1976 raised against Swee Hoe Realty Sdn. Bhd. of Batu Pahat. On 8 July 1976 the accused prepared the original bill where the total professional charges was given at RM6,000. This bill was typed by Rosalind Koh and it was duly signed by the accused before it was despatched to Swee Hoe Realty Sdn. Bhd. (Ex. P9). It was the case of the prosecution that the accused also prepared a set of substituted bill no. 451 of 1976 against Swee Hoe Realty Sdn. Bhd. for the same amount claimed and inserted therein the same date. The set of substituted bill contained substantially the same particulars as the

original bill (Ex. P9) except for two material differences in that (a) the amount of professional charges was reduced to RM5,000 and (b) there was an additional item of disbursement, *viz*: "Mr. Wong's transport and allowance to attend meetings in Singapore and Kuala Lumpur and Johor Bahru to expedite tax clearance and completion of sale and purchase" ... RM1,000 which did not appear in the original bill. This substituted bill was marked as Ex. P2. On 9 August 1976 the accused made out a cash cheque for RM1,000 and withdrew this sum from the OCBC clients' Account No. 2799 *vide* Cheque No. 903871 (Ex. P11). The following writings: "Cash. Mr. Wong's transport & allowance to attending meetings in Singapore, Kuala Lumpur & JB." appeared in the cheque butt (Ex. P11(a)). Records of this withdrawal could be seen in the clients' ledger folio 25 (Ex. P19) and clients' cash book folio 49 (Ex. P23) as well as in the bank statement for the month of August 1976 (Ex. P5(b)) and in the bank ledger (Ex. P15).

In the August 1976 statement of accounts sent to the partners in Kuala Lumpur (Ex. P24(b)) the accused was shown to have made the following claims, *viz*:

(a)	Transport	-	RM 400.00
(b)	Entertainment	-	RM1,008.26
(c)	Disbursements	-	RM1,541.10

making a total of RM2,949.36. However, entries in the office cash book folio 5-6 (Ex. P20) showed similar claims having been made by the accused except that the figure for disbursements was only RM769.20. Again the prosecution do not appear to be interested in these discrepancies but only on the withdrawal of the sum of RM1,000 by the accused from the clients' account. Apart from the writings on the cheque butt (Ex. P11(a)), clients' ledger (Ex. P19) and clients's cash book (Ex. P23) it was the contention of the prosecution that there was no supporting voucher to justify this withdrawal, in view of the fact that in the same month of August 1976 the accused had also claimed allowances for transport, entertainment and disbursements amounting to RM2,949.36.

Next, I would deal with bill no. 673 of 1976 raised against Johor Oil Palm Plantations Sdn. Bhd. On 18 December 1976 the accused prepared the original bill where the professional charges were given as RM14,000 and disbursements as RM575. This bill was again typed by Rosalind Koh and it was signed by the accused before it was sent out to Johor Oil Palm Plantations Sdn. Bhd. (Ex. P6(a)). It was the case of the prosecution that the accused also prepared a set of substituted bill no. 673 of 1976 raised against Johor Oil Palm Plantations Sdn. Bhd. bearing the same total sum claimed as well as the same date. This substituted bill contained substantially the same details as the original bill (Ex. P6(a)) except for two material differences in that (a) the amount of the professional charges was reduced to RM11,000 and (b) in the disbursements column there was an additional item for RM3,000 as "agreed disbursements" (Ex. P3). On 30 December 1976 the accused made out a cash cheque for RM3,500 and withdrew this sum from OCBC clients' Account No. 2799 *vide* cheque No. 963538 (Ex. P12) but the cheque butt of this cheque could not be traced despite some effort to do so. It was the contention of the prosecution that this sum of RM3,500 represented (a) RM3,000 as "agreed disbursements" and (b) RM400 for Mr. Wong's air passage, transport, hotel charges to Kuala Lumpur (12 and 13 December 1976) and subsistence allowance and RM100 for Mr. Wong's transport allowance to Kluang (16 December 1976 (see p. 3 of Ex. P6(a) and P3). Records of this withdrawal could be seen in the clients' ledger folio 58 (Ex. P19) and in the clients' cash book folio 70 (Ex. 23) as well as in the bank statement for the month of December 1976 (Ex. P5(c)) and in the bank ledger (Ex. P16).

In the statement of accounts sent to the partners in Kuala Lumpur for the month of December 1976 the accused was shown to have claimed the following, *viz*:

(a) Transport - RM 400.00
(b) Entertainment - RM 503.42
(c) Disbursements - RM1,122.31

making a total of RM2,025.73. However, entries in the office cash book folio 22-23 (Ex. P20) revealed similar claims to have been made by the accused except that the claim for disbursements was RM701.31 only. Again the prosecution does not appear to be interested in these discrepancies but only in the withdrawal of the sum of RM3,500 by the accused from the clients' account. Senior Federal Counsel realised that this withdrawal of RM3,500 included a sum of RM500 which appeared in the disbursements column of the original bill no. 673 of 1976 (Ex. P6(a)) relating to accused's claims for air-passage, transport, hotel charges and subsistence allowance in Kuala Lumpur (RM400) and accused's transport allowance to Kluang (RM100). It was conceded that the accused had a legitimate claim to the sum of RM500 and that the prosecution are only concerned with the withdrawal of RM3,000. As a result, application was made during the course of the trial to reduce the sum which the accused was alleged to have committed criminal breach of trust of from RM16,000 to RM15,500. Since the defence did not object to the application I accordingly allowed it. The first principal charge was amended and the accused reiterated his plea of not guilty.

Lastly, I would deal with bill no. 152 of 1977 raised against Textile Corporation of Malaya Bhd., Johor Bahru. On 10 March 1977 the accused prepared the original bill where the professional charges were stated to be RM8,000 and disbursements totalling RM15,418. This bill was typed by Rosalind Koh and signed by the accused before it was despatched to Textile Corporation of Malaya Bhd. (Ex. P8(a)). It was the case of the prosecution that the accused prepared a set of substituted bill no. 152 of 1977 bearing the same total sum claimed and inserted therein the same date. This substituted bill contained substantially the same particulars as the original bill (Ex. P8(a)) except for two material differences in that (a) the amount of the professional charges was reduced to RM6,500 and (b) the amount of stamp fee under the disbursement column was increased to RM16,509 by another RM1,500 and these extra words "and agreed disbursement" were typed therein. On 14 April 1977 the accused made out a cash cheque for RM1,500 and withdrew this sum from the OCBC clients' Account No. 2799 *vide* Cheque No. 000796 (Ex. P13) and the writings on the cheque butt showed "Cash. Agreed disbursements" (Ex. P13(a)). Records of this withdrawal could be seen in the clients' ledger folio 84 (Ex. P19) and clients' cash book folio 82 (Ex. P23) as well as in the bank statement for the month of April 1977 (Ex. P5(d)) and in the bank ledger (Ex. P17).

In the statement of accounts for the month of April 1977 sent to the partners in Kuala Lumpur (Ex. P24(d)) the accused was shown to have made claims of the following items, *viz*:

(a) Transport - RM800.00
(b) Entertainment - RM401.40
(c) Disbursements - RM784.20

making a total sum of RM1,985.60. However, entries in the office cash book folio 35-36 showed similar claims having been made by the accused except that the figure for disbursements was RM355 only. The prosecution does not appear to be interested in these discrepancies but only on the withdrawal of the sum of RM1,500.

On the evidence the prosecution had proved beyond reasonable doubt that although Rosalind Koh (PW11) typed all the original and substituted bills herein it was the accused who prepared them. Besides, the accused also signed on all the original and substituted bills.

I have already mentioned earlier on that the first copy of the original bill was despatched to Soga Berhad, Swee Hoe Realty Sdn. Bhd., Johor Oil Palms Plantation Sdn. Bhd. and Textile Corporation of Malaya Bhd. On the testimonies of Ong Chize Sin (PW2) the administrative assistant of Soga Berhad, Batu Pahat, Dato' Tan Suan Chuan (PW3) the chairman of Swee Hoe Realty Sdn. Bhd., Batu Pahat, Lee Nge Mooi (f), (PW4), the account supervisor of Supreme Corporation and Johor Oil Palms Plantations Sdn. Bhd. a subsidiary of Supreme Corporation and Teo Hock Jiang (PW5), the assistant accounting manager of Textiles Corporation of Malaya Sdn. Bhd. I am satisfied beyond reasonable doubt that they did not receive the first copy or duplicate copy of the substituted bill abovementioned. And on the evidence of these four prosecution witnesses I am satisfied beyond reasonable doubt that:

(a) bill no. 414 of 1976 (Ex. P7) for RM122,764.20.
(b) bill no. 451 of 1976 (Ex. P9) for RM6,000
(c) bill no. 673 of 1976 (Ex. P6(a)) for RM14,575 and
(d) bill no. 152 of 1977 (Ex. P8(a)) for RM23,418

had been paid as evidence by entries in the clients' ledger (Ex. P19), clients' cash book (Ex. P23) and the bills book (Ex. P18) at folio 57, 59, 70 and 78 respectively.

When were these substituted bills typed? It was the contention of the prosecution that these substitute bills were typed at the same time as the original bills. On the evidence adduced I am not satisfied that this contention had been established beyond reasonable doubt. And on the testimonies of Rosalind Koh (PW11) and Micky Lee (PW12) the prosecution had proved beyond reasonable doubt that the substituted bills referred to herein were typed after the clients had settled the original bills of the professional charges.

Following the typing and signing of the substituted bill it was the case of the prosecution that duplicate copies of the original bill were removed from the clients' file and in its place was replaced a copy of the newly typed substituted bill. Another copy of the substituted bill was kept in the bills file. It was common ground that the bills in the bills file were kept in running numbers. It was the contention of the prosecution that the first copy of the substituted bill was never put in the clients' file and a copy of it was never kept in the bills file. If copies of the original and substituted bills were kept in the bills file, how was that the auditing clerk did not see them when he audited the books and accounts of the Johor Bahru branch office of Allen & Gledhill in 1976 and 1977 for the accounting years of 1975 and 1976? According to Goh Kar Swee (PW8) he checked both the clients and bills files in the course of his audit (at random) and he said that he had never come across two sets of bills in the same file dealing with the same subject-matter. However, in the year 1977 Goh said that he did see bill no. 673 of 1976 (Ex. P3) in the bills book (Ex. P18 folio 70) and he recognised the green tick as having been made by him in the course of the audit. In the bills book Goh only saw particulars of the (a) total amount of bill, (b) the amount of profit cost and (c) the amount of disbursements. If he saw two sets of bills in the same file with two different sets of figures he would regard them as irregular if they are related to the same matter. He would report this finding to his superior but no report was made by him in respect of this particular bill. Goh did not make any report in respect of (a) bill no. 414 of 1976 (Ex. P1) and (b) bill no. 451 of 1976 (Ex. P2). If a report had been made by him to his superior this would be reflected in the audit report of Messrs. Peat, Marwick & Mitchell Co., the auditors, to Allen & Gledhill, Kuala Lumpur.

On the other hand, the evidence of Rosalind Koh (PW11) the secretary and Micky Lee (PW12) the cashier at the branch office at the material times was that after the typing and signing of the second bill which they chose to call "Reference Bill", the first and second copies of the

reference bill were put in the clients' file together with the duplicate copy of the original bill. Another copy of the reference bill was kept in the bills file together with a copy of the original bill. In other words, there would be two sets of the original and reference bills in the clients' file and the bills file. It was common ground that the first copy of the reference bill was never sent to the client after it had been typed by Rosalind Koh (PW11) and signed by the accused. Before considering these rival testimonies, it was not in dispute that all the entries in the clients' ledger, office cash book and the bills book were based on the particulars contained in the reference bills. If there were two sets of the same bills in the files the cashier would have to seek clarification from the accused as to which set of the bills was to be used to record the entries in the various books of accounts. No evidence was given by the cashier that he ever sought directions from the accused about this matter. It was explained by the cashier that the purpose of the reference bill was to used to show the movements of money in the clients' account and for auditing and accounting purposes only. If this were the case the cashier had failed to give a satisfactory explanation why the entries in the clients' ledger, cash book and bills book should be based on the reference bills and not on the original bills? In view of the unsatisfactory explanations I prefer and accept the evidence of Goh to that of Rosalind and Micky. Besides, Goh was an impartial witness whereas Rosalind and Micky had been working under the accused for about ten years and were parties in the typing of the reference bills (in the case of Rosalind Koh) and in the withdrawals of moneys from the clients' account (in the case of Micky Lee). Having accepted the testimony of Goh I am satisfied that the prosecution had proved beyond reasonable doubt that only one set of bill was kept in the clients' file and in the bills file and the set which was kept in these two files were the substituted bills (which the prosecution called them) or reference bills (which the defence chose to call them), *viz*. Ex. P1, P2, P3 and P4.

Without copies of the original bills in the clients' file or the bills file it was the case of the prosecution that the irregularities could not be detected in the course of an ordinary audit as the auditors or their assistants would not know the material discrepancies between the professional fees and disbursements claimed in the original bills and the sums shown in the substituted bills which were kept in the files. As only copies of the substituted bills were put in the clients' file and bills file the auditors would only check the figures with the entries in the clients' ledger, cash book and bills book. Why did the accused adopt this procedure of withdrawing moneys from the clients' account instead of from the office account? It was the contention of the prosecution that this substituted bill system was an ingenious device or disguise to justify the withdrawals of moneys from the clients' account for an illegitimate purpose without having to disclose them in the statement of account sent to the partners in Kuala Lumpur every month. According to the prosecution, the accused had to submit monthly statements of accounts to the partners in Kuala Lumpur showing (a) the total income of the branch office for the particular month, (b) details of the expenditure for the month and (c) the estimated nett profit for that month. After deducting his share of the nett profit the accused would send to Kuala Lumpur a cheque containing the share of the nett profit of the partners together with the statement of account for that particular month. It was common ground that all the details of the expenditure of the branch office were taken from the office ledger and cash book. The monthly statements did not and would not contain any entry taken from the clients' ledger and the cash book. It follows that any withdrawal made by the accused from the clients' account would not be reflected in the monthly statements of accounts sent to the partners in Kuala Lumpur. And the partners would not know of these withdrawals made by the accused. On the other hand, if the withdrawal were made from the office account this would have to be recorded in the monthly statements of accounts sent

to the partners in Kuala Lumpur. If the withdrawal was a substantial one (like the withdrawal of RM10,000 in bill no. 414 of 1976 (Ex. P1) this might attract the unnecessary attention of some of the partners in Kuala Lumpur and questions might be asked and the accused would have to give an explanation. It was common ground also that when the accused was in charge of the branch office at Johor Bahru, he was given a fixed transport allowance of RM400 each month. He was also entitled to incur and to claim reasonable entertainment expenses. I think the question of what was reasonable is a question to be determined by the accused subject to the approval of the partners in Kuala Lumpur. It would be grossly unreasonable to expect the partners to give to the accused a blank cheque to spend for entertainment. Besides, the partners would expect vouchers to support the claim, if it was a fairly large one. In addition, the monthly statements showed a claim for disbursements and one would expect supporting bills would be produced to substantiate this claim.

A perusal of:

(a) Bill no. 414 of 1976 (Ex. P7 and Ex. P1) revealed that the accused had reduced the amount of professional fee in the original bill (Ex. P7) from RM16,000 to RM6,000 in the substituted bill (Ex. P1) and increased the amount of disbursements for stamp duty on transfer from RM84,437 to RM94,437 with the addition of the words "and agreed disbursements". The exact amount of stamp duty payable on transfer is a matter of simple calculation since there is a scale fixed by the authority. It was the contention of the prosecution that instead of transferring the sum of RM16,000 to the office account the accused by means of a substituted bill (Ex. P1) transferred only RM6,000 and pocketed the difference of RM10,000, under the guise of the phrase "and agreed disbursements".

(b) Bill no. 451 of 1976 (Ex. P9 and Ex. P2) revealed that the accused had reduced the amount of professional fee in the original bill (Ex. P9) from RM6,000 to RM5,000 in the substituted bill (Ex. P2) and added another entirely new item dealing with "disbursements" for the sum of RM1,000. It was the contention of the prosecution that the accused should have transferred the whole of RM6,000 to the office account. Instead he transferred only RM5,000 and pocketed the balance of RM1,000 under the guise of a claim for disbursements which he should have claimed in the proper way.

(c) Bill no. 673 of 1976 (Ex. P6(a) and Ex. P3) revealed that the accused had reduced the amount of professional fee in the original bill (Ex. P6(a)) from RM14,000 to RM11,000 in the substituted bill (Ex. P3) and added another entirely new item under the disbursements column which he named "agreed disbursements" for RM3,000 without the knowledge and consent of Johor Oil Palm Plantations Sdn. Bhd. or their representative. It was the contention of the prosecution that instead of transferring RM14,000 paid by the clients as professional charges in Ex. P6(a) to the office account the accused by means of a substituted bill (Ex. P3) transferred only RM11,000 and pocketed the balance of RM3,000 under the guise of the phrase "agreed disbursements".

(d) Bill no. 152 of 1977 (Ex. P8(a) and Ex. P4) revealed that the accused had reduced the amount of professional fee in the original bill (Ex. P8(a) from RM8,000 to RM6,500 in the substituted bill (Ex. P4) and increased the amount of stamp fee under the disbursements column from RM15,009 to RM16,509 with the addition of the words "and agreed disbursements". The exact amount of stamp duty payable on a transfer is a matter of simple calculation since there is a scale fixed by the authority. It was the contention of the prosecution that instead of transferring RM8,000 to the office account the accused by means of a substituted bill (Ex. P4) transferred only RM6,500 and pocketed the balance of RM1,500 under the guise of the phrase "agreed disbursements".

It was the case of the prosecution that by means of this clever 'devise the accused had siphoned unto himself from these four bills alone during a period of approximately nine months a total sum of RM15,500,' moneys which lawfully belonged to the branch office. On

the evidence adduced the prosecution had proved beyond reasonable doubt that the accused had misappropriated a total sum of RM15,500 which was the subject of the amended first principal charge. That however, was not the end of the matter. The prosecution had still to satisfy me beyond reasonable doubt that the misappropriation of the RM15,500 by the accused was dishonest, for without dishonesty there could be no criminal breach of trust and the remedy (if any) is in the civil Courts.

Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly" (s. 24 of the Penal Code).

> Dishonesty may be inferred from surrounding circumstances and the terms upon which the accused had the money in his hands. When such money is rightfully in the hands of the accused, mere non-production of it will not, except in exceptional circumstances, amount to an offence under s. 409. To establish dishonesty, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for one's own benefit for a time may be sufficient. It is not necessary to prove in what precise manner the money or property was misappropriated. The essential thing to be proved is that the accused was actuated by dishonest intention. The failure of the accused to account for the money proved to have been received by him or giving a false account as to its use is generally a strong circumstance against the accused. The mental act of intent to deprive the owner of his property is the gist of the offence. Criminal breach of trust is not an offence which counts, as one of its factors the loss that is the consequence of the act. It is the act itself which in law amounts to an offence.

The above passage was taken from *Gour's Penal Law of India* (8th Edn.,) Vol. 4 at pp. 2930-2931. The passage was cited by Ismail Khan J (as he then was) in *Mohamed Adil v. PP* [1967] 1 MLJ 151 and by Raja Azlan Shah J (as he then was) in *Sathiadas v. PP* [1970] 2 MLJ 241. Since it had been established by the prosecution that the substituted bills were a device designed by the accused to withdraw money from the clients' account which rightfully belonged to the firm for illegitimate purposes and without having to account for it in the monthly statements of accounts sent to the partners in Kuala Lumpur there was ample evidence where the Court could infer that the misappropriation was deliberate and dishonest. I therefore find that the prosecution had proved beyond reasonable doubt that misappropriation was actuated by dishonest intention.

I turn now to deal with the alternative charge of falsification of bill no. 414 of 1976 under s. 477A of the Penal Code. In order to bring home an offence under this section the prosecution have to prove beyond reasonable doubt that (a) at the relevant time, the accused was employed as a servant by Allen & Gledhill, (b) that acting in the capacity, he falsified bill no. 414 of 1976 which was in the possession of his employer in Johor Bahru and (c) that he did so wilfully and with intent to defraud (see *S. Harnam Singh v. The State Delhi Admin.* [1976] SC Cr. LJ 913 at p. 917).

Having regard to my finding on the first principal charge that the accused was in the employment of Allen & Gledhill or Allen & Gledhill, Johor Bahru as a servant at the material time, there is therefore no dispute about the first ingredient and I hold that it had been satisfactorily proved. With regard to the second ingredient evidence had been adduced that after Soga Berhad, Batu Pahat had paid the original bill (Ex. P7) the accused prepared a substituted bill (Ex P1) in substantially the same manner as the original bill except for two material differences, *viz*. (i) the amount of the professional charges was reduced from RM16,000 to RM6,000 and (ii) the amount of stamp duty on transfer under the disbursements

column was increased from RM84,437 to RM94,437 with the addition of these extra words "and agreed disbursements". Thus the original bill was falsified by the reduction of the professional fee and transferring of RM10,000 as "agreed disbursements" without any vouchers to support it. The prosecution had adduced evidence that only one bill could be raised against a client. If there was any amendment by way of discount this would be endorsed on the bills book (Ex. P18) at the "remarks" column. Alternatively, a fresh bill could be issued to the client and the previous bill cancelled. This cancellation would also be endorsed in the bills book. In *Ra, Chang Gurvala & Ors. v. King-Emperor* [1926] AIR Lahore 385 it was held that it is not necessary for the prosecution to prove that any person or persons were actually deceived by the false document. It is quite sufficient if in the opinion of the Court the document had that tendency. The expression "falsify" applies to the preparation of an entirely new document containing false information. To falsify means to render false and a new document containing false information can be correctly described as a false document and the act of preparing such a document is falsification of the document. Applying this to the facts of this case I would also hold that the second ingredient had been proved by the prosecution beyond reasonable doubt. I come now to deal with the third and last ingredient which consists of two limbs, *viz*. (i) wilfully and (ii) with intent to defraud. "Wilfully" as used in s. 477A means "intentionally" or "deliberately" (see *S. Harnam Singh's* case (*supra*) at p. 918) and on the evidence produced by the prosecution, there was ample evidence for me to hold that the substituted bill no. 414 of 1976 (Ex. P1) was made by the accused intentionally, deliberately and wilfully.

At p. 918 Sarkaria J said:

> The Code does not contain any precise and specific definition of the words "intent of defraud". However, it has been settled by a catena of authorities that "intent to defraud" contains two elements, *viz*: deceit and injury. A person is said to deceive another when by practising *"suggestio falsi"* or *"supressio veri"* or both he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. "Injury" has been defined in s. 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property.

By itself the substituted bill no. 414 of 1976 (Ex. P1) would appear to be an innocuous document but when it was compared with the original bill (Ex. P7) sent to Soga Berhad and when the client paid the bill on the basis of Ex. P7 it was plain that the accused had practised deceit on his employer. Besides, all the entries in the clients' ledger (Ex. P23) as well as in the office cash book (Ex. P19) and bills book (Ex. P18) were based on the substituted bill no. 414 of 1976 (Ex. P1) and not on the original bill (Ex. P7). It was the case of the prosecution that the whole of the RM16,000 professional fee should have been transferred to the office account and by means of the substituted bill (Ex. P1) the accused only transferred RM6,000 thereby the profit costs of the branch office was reduced by RM10,000. By this device the prosecution contended that the accused had practised a fraud on the partners of Allen & Gledhill in Kuala Lumpur who were entitled to share the profit costs of RM10,000 with the accused proportionately.

On the other hand, it was argued by the Senior Federal Counsel that if the professional fee were discounted by RM10,000 then the said sum should either be refunded to Soga Berhad or credited into its account in the clients' account. It was submitted that the accused could not legitimately make use of the RM10,000 as "agreed disbursements" in this manner. It was also argued that by adopting this device the taxing authority had been wrongly deprived of imposing tax on the RM10,000 or a part of it.

Applying the law to the facts of this case I am satisfied beyond reasonable doubt that the prosecution had established the third ingredient.

Hence at the close of the prosecution case I called upon the accused to enter his defence on the amended first principal charge as well as the alternative charge.

I would now deal with the defence of the accused.

The accused said that he was admitted to the Malayan Bar on 1 February 1966 after graduating from the University of Singapore with a Bachelor of Laws degree with honours. He then worked for several legal firms before joining Allen & Gledhill as a legal assistant by signing a service agreement on 25 July 1970 (Ex. P29(b)), and was assigned to take charge of the Johor Bahru branch office.

When the accused took over the branch office from Mr. Manaf Ghows on 1 September 1970 Micky Lee (PW12) was the cashier. PW12 also kept the account books of the office as well as the clients. In 1971 Rosalind Koh (PW11) was employed as a junior secretary and was later promoted to be the personal secretary of the accused.

When a bill was raised against a client three copies would be typed. The first copy would be sent to the client, the second copy would be kept in the clients' file and the third copy would be kept in the bills file. The clients' file would be under the charge of a clerk and the bills file by Micky Lee (PW12).

In 1972 the accused said that the branch office was instructed by Temonggong Securities to do conveyancing work involving a large piece of property in Johor. Allen & Gledhill, Singapore also did some work for Temonggong Securities. On 2 October 1972 the accused raised a bill no. 807 of 1972 against Temonggong Securities claiming the sum of RM79,345 of which RM18,435 was stated as professional charges and the balance as disbursements (Ex. D22(b)). After despatching Ex. D22(b) to the client the accused said that he received a bill for work done sent by Allen & Gledhill, Singapore for RM9,000 as professional fee and RM50 as disbursements (Ex. D22(a)). When Ex. D22(a) was received the accused said he asked Micky Lee (PW12) what was to be done. PW12 replied that according to past practice Ex. D22(a) would be paid out from the RM18,435 paid by the client and a reference bill would be prepared to show the movement of the money from the clients' account. The reference bill would be used for accounting and auditing purposes only. According to PW12 three copies of the reference bill would be typed, the first and second copies would be kept in the clients' file and the third copy in the bills file. None of the reference bill would be sent to the client. After hearing this the accused said he decided to follow this past practice. So when Temonggong Securities paid bill no. 807 of 1972 the accused prepared a reference bill whereby the (a) professional fee was reduced to RM9,435 and (b) an additional item was included in the disbursements column for RM9,050 to cover the bill sent by Allen & Gledhill, Singapore. However, the total sum remained the same, *viz*. RM79,345 (Ex. D22(c)). Instead of transferring RM18,435 to the office account as profit costs from the clients account the accused only transferred RM9,435 and made out a cheque for RM9,050 to settle bill no. 1637 of 1972 sent by Allen & Gledhill, Singapore. Arising out of this transaction the accused said that Temonggong Securities was subsequently involved in a Court case with the Registrar of Titles, Johor. Because of the importance of the case the accused said that the late Mr. R.C. Hoffman was briefed as senior Counsel and he acted as his junior. The accused alleged that the late Hoffman saw both the conveyancing as well as the case files. In the conveyancing file the accused said that the late Hoffman saw the reference bill (Ex. D22(c)) and copy of the original bill (Ex. D22(b)), and enquired about them. The accused said he told the late

Hoffman that the reference bill (Ex. D22(c)) was for accounting and auditing purposes only. Since the late Hoffman did not raise any objection to the reference bill the accused assumed that he approved the system.

In 1976 and 1977 when the late Hoffman approved the expenditure of extra money in entertaining special clients in order to induce them to give the conveyancing work of the housing estates to the branch office the accused said that he adopted the reference billing system to indicate the movements of moneys from the clients' account, that is to say, that he had withdrawn:

(a) RM10,000 from Soga Bhd. clients' account *vide* bill no. 414 of 1976 (Ex. P1),

(b) RM3,000 from Johor Oil Palm Plantations Sdn. Bhd. clients' account *vide* bill no. 673 of 1976 (Ex. P3), and

(c) RM1,500 from Textiles Corporation of Malaya Sdn. Bhd. clients' account *vide* bill no. 152 of 1977 (Ex. P4).

for such purposes under the heading of "agreed disbursements". In the case of Swee Hoe Realty Sdn. Bhd. bill no. 451 of 1976 (Ex. P2) the accused explained that the reference bill (Ex. P2) was prepared to show the movement of money, that he had withdrawn RM1,000 from the clients' account of Swee Hoe Realty Sdn. Bhd. in connection with his claim for transport and outstation allowances in travelling to Singapore, Kuala Lumpur and Johor Bahru to attend meetings to expedite tax clearance and completion of the sale and purchase.

Under cl. 8 of the service agreement (Ex. P29(b)) it was provided that:

> Immediately before the expiration of this agreement by effluxion of time (31 December 1973) the assistant (accused) shall be entitled to three (3) months' leave with full pay plus commission such leave to be taken during the last three months of this agreement.

The accused said that towards the end of his contract he was anxious to know about his future. So, when he and the late Hoffman were in Muar High Court to take delivery of the judgment in the Temonggong Securities case in August 1973 he brought up the subject whether or not the firm would make him a partner at the expiration of the service agreement on 31 December 1973. According to the accused the late Hoffman expressed satisfaction with his work and performance and there and then told the accused that he (Hoffman) would make the accused a partner of the Johor Bahru branch office with effect from 1 January 1974. It was alleged that the works with banks in Johor Bahru came up for discussion. The accused said he told the late Hoffman that the branch office did not get any legal work from Malayan Banking, and he explained that perhaps the branch office did not have an account there. The late Hoffman then told the accused to open a bank account there. In early 1974 the accused sent Micky Lee (PW12) to obtain the application form from Malayan Banking then on 8 January 1974 he instructed Micky Lee to type in the particulars. After all the partners in Kuala Lumpur had signed the application form it was then sent to the bank and a clients' account no. 5218 was opened at Malayan Banking (Ex. D8). In the same year on 2 December 1974 another clients' account no. 5142 was opened at Chung Khiaw Bank, Johor Bahru (Ex. D10). In both these partnership account forms the accused's name appeared as one of the four partners and he also signed as one of the partners.

In support of this the accused said that prior to his retirement from the branch office on 31 October 1981 the partners in Kuala Lumpur sent letters to the banks in Johor Bahru where he was referred to as "the partner of our Johor Bahru office Mr. Wong Kim Fatt ..." (see Ex. D3, D9, D11). In another letter dated 21 January 1974 addressed to the manager of OCBC,

Johor Bahru, reference was made to"... four members of our firm" (Ex. D4). And in the application for renewal of practising certificate for the year 1978, the word "partnership" was inserted in answer to a question: "whether you are practising on your own, in partnership or employed?" (Ex. D17). If he was not a partner but was only a legal assistant the accused said that partnership account forms (Ex. D8 and D10) would not be used but a mandate form (Ex. D25) would be the most appropriate.

Explaining why he continued to contribute to the Employees Provident Fund after he became a partner of the Johor Bahru branch office on 1 January 1974 the accused said that he did so with the knowledge of the late Hoffman after discussing the matter with him as this contribution was a form of savings. However, when his percentage of the nett profit of the branch office was raised to 45% on 1 January 1977 the accused said that the late Hoffman suggested that the contribution to EPF should stop. Following this the accused said he ceased contributing to EPF as from 1 January 1977.

Asked why he certified himself to be an "employee" of the Johor Bahru branch office for the period ending 1976 and 1977 in the return of income from employment forms when he was a partner of the branch office with effect from 1 January 1974 the accused explained that since his yearly income consisted of (a) salary plus (b) a share of the nett profit of the branch office he said that this EA form was the nearest type of form covering his case. He said he was not aware of any form dealing with a partner who draws both a salary and a share of the nett profit of the branch office.

On a trip to Kuala Lumpur the accused said he told the late Hoffman about the vast potential of Soga Berhad who was a big housing developer in Johor and special attention ought to be paid to the chairman of the company for the benefit of the branch office. He said that he would be doing a lot of entertainment and travelling outstation with the chairman in the next few months. Since some of the cost of entertainment would not be reflected in the bills the accused said he asked the late Hoffman whether he could withdraw some money from the professional fee paid by Soga Bhd. and use it for these purposes. The accused said the late Hoffman approved a sum of RM10,000. The accused also alleged that the late Hoffman approved the reference billing system used in the Temonggong Securities case to be adopted for this purpose. So when Soga Bhd. paid the Original bill no. 414 of 1976 (Ex. P7) the accused withdrew RM10,000 from the clients account to be used in entertaining the chairman of Soga Bhd., as agreed between him and the late Hoffman.

Similar arrangements were agreed to by the late Hoffman with regard to Johor Oil Palm Plantations Sdn. Bhd. and Textiles Corporation of Malaya Sdn. Bhd. where the accused withdrew the sums of RM3,500 (RM500 for accused's transport, air passages, hotel charges and subsistence) and RM1,500 respectively. The accused said that all these three withdrawals and the withdrawal of RM1,000 in bill no. 451 of 1976 (Ex. P2) were made openly without any attempt at secrecy or concealment. Besides, the accused said that he told Micky Lee (PW12) that the late Hoffman had agreed to these withdrawals, and all these four withdrawals had been properly entered in the clients' ledger and clients' cash book. Reasons for the withdrawals were also entered therein as well as in the cheque butts. The accused alleged that he made records of these expenditure in a note and the note was filed in the clients' files.

At the end of each financial year the accused said the licensed auditors would be appointed by the partners in Kuala Lumpur to audit the books and accounts of the Johor Bahru branch office. For the years 1976 and 1977 the auditors were Peat, Marwick & Mitchell, Chartered Accountants. The accused recognised one of the auditing clerks or assistants as Goh Kar

Swee (PW8), and usually two auditing clerks would check the books, accounts as well as the clients' and bills files. The accused said one of them questioned him about the reference bills found inside the clients' files and the term "agreed disbursements". He replied that "agreed disbursements" meant that the late Hoffman had agreed to these disbursements and this was accepted by the auditing clerk. The accused said that he was queried about all the four withdrawals which formed the subject of the first principal charge and his explanation had been accepted by the auditing clerk.

On the reference bills he explained that they were prepared to show the movement of moneys from the clients' account and they were used mainly for accounting and auditing purposes. It was alleged that the auditing clerk accepted his explanation without comment. The accused said that the auditing clerk saw both copies of the original and reference bills in the clients and bills files and he did not make any comment on them. Nor did he or the auditors suggest any change in the billing system in their reports to the partners in Kuala Lumpur in the years 1976 and 1977.

To summarise, the defence of the accused was:

(a) that he was made a partner of the Johor Bahru branch office with effect from 1 January 1974 by the late Hoffman and that he remained a partner until his retirement on 31 October 1981,

(b) that all the three withdrawals of RM10,000, RM3,000 and RM1,500 for agreed disbursements were approved by the late Hoffman,

(c) that the withdrawal of RM1,000 in bill no. 451 of 1976 was in connection with his legitimate claim for transport and outstation allowances, and

(d) that all these four withdrawals were made openly and there was no concealment or secrecy about them. As such, there was no dishonest misappropriation of them.

Under cross-examination by Senior Federal Counsel the accused admitted that there was no mention of an offer of a partnership in the service agreement (Ex. P29(b)) at the expiration of the term on 31 December 1973. In all his correspondence with the late Hoffman and Mr. Joseph Lai (PW16) the accused did not mention about having been made a partner of the Johor Bahru branch office by the late Hoffman as from 1 January 1974 nor did he ask to be made a partner of the branch office. On the contrary, in his letter to the late Hoffman on 1 December 1974 the accused said:

> May I write to you about my arrangement with the firm. My original service contract signed with Mr. Booker on behalf of the firm expired on 31 December 1973 and since then for the whole of 1974 I have been working practically on the old terms, and I thought these should now be revised and improved with effect from 1 January 1975. I have no doubt you would now look into this matter immediately as you have promised to do so when I saw you in Kuala Lumpur on the Annual Dinner day on 14 September. I am now getting RM1,500 as salary plus 25% of the nett profit of Johor Bahru ... (Ex. P30(c)).

If the accused had been made a partner of the branch office by the late Hoffman with effect from 1 January 1974 surely the accused would have mentioned it in this letter. On the other hand, when the percentage of the nett profit of the accused was raised to 45% he immediately wrote to confirm it on 16 November 1976 as follows:

> Following my discussion with you and Joseph on 4th instant, I write to confirm that with effect from 1 January 1977 my share of the Johor Bahru office nett profit will be 45%. The monthly salary of RM1,600 will remain the same. (Ex. P30(f)).

A perusal of the undermentioned letters would seem to indicate that the late Hoffman was a person who was not prone to making hasty decisions without consulting his partners in Kuala Lumpur, insofar as financial matters or matters involving financial implications were concerned. When on 26 April 1971 (Ex. P29(a)) the accused wrote to him about revising the terms of his salary when the service agreement was still subsisting he instructed Mr. Joseph Lai to reply, *inter alia*:

> I have been requested by the partners to inform you that since your present contract is still in existence ... they are unable to consider any fresh arrangements ... (Ex. D7).

Undaunted, the accused made two other attempts to request Mr. Lai to reconsider the matter on 31 July 1972 (Ex. P30(a)) and on 14 September 1972 (Ex. P30(b)) which were ignored. When the accused asked the late Hoffman to better his terms on 23 September 1976 (Ex. P30(d)) instead the late Hoffman asked the accused to write to Mr. Lai (Ex. P30(e)). Despite this the late Hoffman discussed Ex. P30(e) with Mr. Lai and asked for further discussion with the accused on 21 October 1976 (Ex. D15). In view of these it would be strange for the late Hoffman to make the accused a partner of the Johor Bahru branch office on the spot and without consulting his partners in Kuala Lumpur. Besides, according to Mr. Chin Yew Meng (PW9) a legal assistant could become a partner of Allen & Gledhill only by buying some of the shares of an existing partner or a retiring partner. And a legal assistant could not become a partner by mere appointment even though the appointment was made by a senior partner. Having regard to these I am constrained to reject the story of the accused that he was made a partner of Johor Bahru branch office by the late Hoffman in August 1973 to take effect on 1 January 1974. In my view, the story of the accused was not reasonable or probable having regard to the above facts.

The accused was cross-examined by Senior Federal Counsel about the Malayan Banking application form (Ex. D8) dated 8 January 1974. It was plain that on 15 January 1974 the accused addressed a letter to Mr. Lai enclosing therein several documents including the said application form (Ex. P39(a)) and P39(b). After signing by the partners in Kuala Lumpur a photostat copy was taken of this application form and the specimen signature card (Ex. P39(c)). A comparison of this application form (Ex. P39(b)) and the one produced by the accused (Ex. D8) reveals a number of material differences. In Ex. P39(b) the names of the partners of Allen & Gledhill were not typed into para. 1 and secondly, the accused did not sign his personal signature as one of the partners thereof. When the accused received back Ex. P39(b) he instructed Micky Lee (PW12) to insert the names of the partners in para. 1 which incidentally included his own name. After this had been typed in the accused put his personal signature as the fourth partner of Allen & Gledhill. Be that as it may, after completing typing in the names of the partners and putting his personal signature as the fourth partner the accused sent the completed form to Malayan Banking, Johor Bahru. It was the contention of the prosecution that the accused adopted a similar system in inducing the partners in Kuala Lumpur to sign the application form of Chung Khiaw Bank, Johor Bahru having regard to the peculiar position of the personal signature of the accused in the form (Ex. D10). It was submitted that the partners in Kuala Lumpur would never include the name of the accused as a partner when he was not one at all. This is a reasonable inference to draw in view of the special circumstances of the case and in my opinion, the accused deliberately misled and induced the partners in Kuala Lumpur to sign both the application forms (Ex. D8 and D10). On the evidence I am satisfied that the accused inserted his name as a partner of Allen & Gledhill and put his personal signature to the application form without the knowledge and consent of the partners of the firm in Kuala Lumpur. If the accused were not a partner in law and in fact, the fact that he had induced the partners in Kuala Lumpur to sign the

application forms to make it appear that he was a partner would not *ipso facto* turn him into a partner-in-law. The accused said that he was not aware that the names of the partners had not been typed in para. 1 thereof when he sent the application form to Mr. Lai for the partners there to complete. I am unable to accept this explanation. In my opinion, the act of the accused was well-planned and calculated. The accused knew that since he was not a partner of the firm his name would not appear in para. 1 and he could not put his personal signature as partner otherwise he would attract the undesirable attention of the partners in Kuala Lumpur. On the contrary, the partners of Allen & Gledhill, by such conduct, might be construed to have held the accused out as a partner to Malayan Banking and Chung Khiaw Bank in Johor Bahru. That of course, would be a separate issue in law.

It was argued by leading defence Counsel that the partners in Kuala Lumpur ought to have used the Mandate by partnership form like Ex. D25 instead of the Partnership Account forms like Ex. D8 and D10 to authorise the accused to operate the bank accounts of the branch office if the accused were a legal assistant and not a partner of the branch office. I tend to agree with this submission. But it was contended by the Senior Federal Counsel that Allen & Gledhill, had on various occasion, held the accused out as a partner in view of his status as a "salaried partner" in the firm (see Ex. D3, D9 and D11). It has long been established that a person who is not a partner became liable as if he were a partner to people to whom he so conducts himself as to lead them to act upon the supposition that he is a partner in point of fact. This doctrine is nothing more than an illustration of the general principle of estoppel by conduct. The doctrine of holding out applies in favour of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it. The doctrine is entirely misapplied when it is extended beyond the principle on which it rests. It cannot apply in a criminal case to prove that the person held out is in fact a partner to enable him to escape criminal liability arising out of his true position as a servant.

Although in the application for renewal of practising certificate for the year of 1978 where the accused stated that he was practising in partnership, it should be pointed out that in the next question about the names of the partners, his name did not appear therein. In my view, it was misleading for the accused to state that he was practising in partnership when he was not a partner in law but only regarded as a "salaried partner" by his firm. In my judgment this application form (Ex. D17) did not carry the matter any further.

In my opinion, the use of the term "four members of our firm" who will sign in the manner indicated below in Ex. D4 is an ambiguous one inasmuch as a legal assistant or a "salaried partner" may be termed as a member of the firm in the loose sense. Similarly, Ex. D4 did not help the accused in his claim that he was a partner of the Johor Bahru branch office at the material time.

For the above reasons I reject the story of the accused that he was made a partner of the Johor Bahru branch office with effect from 1 January 1974 or any other date. The story of the accused that the late Hoffman made him a partner of the branch office to commence on 1 January 1974 was not a reasonable or probable one having regard to the facts of this case.

I turn now to deal with the claim of the accused that the late Hoffman approved without hesitation, the expenditure of RM10,000 as agreed disbursements for the sole purpose of entertaining the chairman of Soga Berhad. It was common ground that the late Hoffman and the late Datuk Tan Suan Kok were no longer with us and as the saying goes, dead men tell no tale. Anyway, the story of the accused as to the manner the late Hoffman approved the expenditure must be rejected for the following reasons:

(a) I find it incredible that the late Hoffman, who was slow in making decision in money matter, would give immediate approval for the expenditure of this very large sum of money without consulting his partners and particularly Mr. Joseph Lai when the approval was alleged to be given in his chambers at Kuala Lumpur.

(b) I find it difficult to believe that the late Hoffman would approve a scheme where the expenditure would not be supported by bills and receipts.

(c) I find it surprising that the late Hoffman would keep this approval a secret from Mr. Lai who appeared to be in charge of the business side of the firm.

(d) I find it impossible to believe that the late Hoffman would approve such an expenditure in the manner described which would or might amount to a fraud on the Inland Revenue Department.

(e) Lastly, I find it hard to accept that the late Hoffman could approve such expenditure which might amount to acts of unprofessional conduct or conduct unfitting the profession.

In my judgment, the story of the accused was most improbable and unreasonable, having regard to the facts of this case. Having rejected the story that the late Hoffman agreed to make the accused a partner of the Johor Bahru branch office in or about August 1973 at the Muar High Court it was inevitable that I had to reject the story of the accused relating to the contribution of EPF from 1974 to 1976 as a piece of fabrication. The same applies to the certification of employees returns of income forms for 1976 and 1977.

The accused said that the late Hoffman also gave approval for similar expenditure to be incurred in connection with Johor Oil Palm case and the Textiles Corporation of Malaya case as agreed disbursements. Although these amounts seems small compared with the expenditure in the Soga Bhd. case, I have to reject it for the same reasons given in rejecting the *Soga Bhd.* case. Besides, in his statement to the police, the accused stated that:

> I also had full authority to spend money for entertainment and other purposes which I thought necessary.

If that was so, why was it necessary for the accused to seek the approval of the late Hoffman for spending RM3,000 in the Johor Oil Palm case and RM1,500 in the Textile Corporation case? A perusal of the monthly statements of accounts sent to the partners in Kuala Lumpur showed that in the month of April 1977 the accused spent a sum of RM401.40 on entertainment and RM784.20 on disbursements. And in December 1976 the amount spent on entertainment was RM503.42 and on disbursements it was RM1,122.31. In my judgment, the story of the accused that he got oral approval from the late Hoffman with regard to these two expenditures was not a reasonable or probable one. In my judgment, the story was a concoction.

I now deal with bill no. 451 of 1976 (Ex. P2) where the accused withdrew a sum of RM1,000 from the clients' account as his transport and allowances to attend meetings in Singapore, Kuala Lumpur and Johor in order to expedite tax clearance and completion of the sale and purchase. If the accused had incurred them legitimately in connection with his professional work, the accused should send an amended bill to Swee Hoe Realty Sdn. Bhd. in accordance with accepted practice. If the accused could not send an amended bill then the proper procedure was for the accused to claim it from the office account, like he normally does as shown in the monthly statements he sent to the partners in Kuala Lumpur (Ex. P24) and this would be reflected in the monthly statements. I see no valid reason why this claim of the accused should be absorbed from the profit cost. The sole reason why the accused adopted

this withdrawal by means of a reference bill was to keep out this withdrawal from the monthly statement of account. I reject his explanation on the ground that it was a concoction. Besides, it was not a reasonable or probable story having regard to the facts of this case.

The purpose of the reference bill was explained by Mr. Manaf Ghows who was in charge of the Johor Bahru branch office prior to 1 September 1970. According to Mr. Ghows (PW14) the Taman Chendrakesh Housing Estate was developed by Sharikat Mosbert in Johor Bahru and the branch office was retained to do the conveyancing works. Mr. Ghows stated that most of the purchasers of the housing lots were Singaporeans and they would come in batches of thirty or fifty at a time to the branch office during the weekends, which were public holidays in Singapore but working days in Johor state. When the purchasers signed the sale and purchase agreements and paid the professional fee and disbursements the clerks only issued them with receipts as they had no time to prepare the bill of professional charges. These would be done after the purchasers had gone and the clerks would prepare the bills during their free time. The bill of professional charges would set out the professional fee of RM50 and the amount of the disbursements RM34 - RM24 for stamp duty and RM10 for registration fee - making a total of RM84 (Ex. P41(b)). After deducting 0.25 cents for bank commission, the sum of RM49.75 would be transferred to the office account. This reference bill would show the movement of moneys in the clients' account and it was clearly marked on the lefthand bottom corner of the bill. The first copy of the reference bill was not sent to the client but would be retained in the clients' file. A copy would be kept in the bills file.

It is important to observe that this reference bill (Ex. P41(b)) differs in material respects from the Temonggong Securities Bill (Ex. D22(c), Soga Berhad Bill (Ex. P1), Swee Hoe Realty bill (Ex. P2), Johor Oil Palm Plantations Bill (Ex. P3) and Textiles Corporation of Malaya Bill (Ex. P4) in that whereas in Ex. P41(b) the whole of the professional fee (less bank commission) was transferred from the clients' account to the office account while in the other five bills, part of the professional fee was utilized to pay off (a) another bill (like the Temonggong Securities case), (b) agreed disbursements like Soga Bhd., Johor Oil Palm Plantations and Textile Corporation and (c) accused personal claim in Swee Hoe Realty. Furthermore, according to Mr. Ghows only one set of the professional bill would be typed whereas in the system of reference bill adopted by the accused, two sets of the professional bill would be prepared. It was the case of the prosecution that the reference bill as used by the accused was not to show the movements of moneys in the clients' account but a clever device to withdraw moneys from the clients' account for an illegitimate purpose without having to show them in the monthly statements of accounts sent to the partners in Kuala Lumpur. In my opinion, the accused improved on the system of reference bill started by Mr. Ghows in 1967 to achieve his own objectives of withdrawing moneys from the clients' account without having to record them in the monthly statements.

Besides, in the Temonggong Securities case the payment of RM9,050 to Allen & Gledhill, Singapore was supported by a proper voucher in the form of bill of professional charges (Ex. D22(a) and receipt and the money was paid to Allen & Gledhill, Singapore. Here, all the four withdrawals from the clients' account were made by the accused himself and all the moneys were received by him. There was no voucher to support the withdrawals or the expenditure.

It was alleged by the accused that the late Hoffman saw the reference bill (Ex. D22(c)) in the conveyancing file of Temonggong Securities when the late Hoffman was briefed as senior Counsel in the High Court case and the accused appeared as his junior. I failed to understand why the late Hoffman had to inspect the conveyancing file when he was preparing a case

for trial in the High Court. If the late Hoffman had seen the reference bill he would have been expected to refer it to the partners in Kuala Lumpur or at least to Mr. Lai. The existence of two sets of bills dealing with the same matter in the same file would surely be suspicious and an investigation might be ordered. I reject this story as a piece of fabrication.

Next, it was argued that all these four withdrawals were made openly without any attempt at concealment or secrecy. There would be some merit in this contention if and only if both sets of the original and substituted bills were kept in the clients' file and in the bills file. If the original bill were not in both files and since all the entries in the clients' ledger and clients' cash book as well as the bills book were based on the substituted or reference bill, this submission was misleading and misconceived. If the original bill were not in both files and since all the entries in the clients' ledger and clients' cash book as well as the bills book were based on the substituted or reference bill, this submission was misleading and misconceived, and I therefore reject it without any hesitation.

It follows that I have rejected the defence of the accused in respect of the amended first principal charge.

As regards the alternative charge of falsification of bill No. 414 of 1976 (Ex. P1) wilfully and with intent to defraud his employer under s. 477A of the Penal Code, the accused had said very little in defence thereof. It seems that the main thrust of his defence to this alternative charge was tied up with his story that the withdrawal of the sum of RM10,000 from the clients' account as agreed disbursements was approved by the late Hoffman. Since this story has been rejected by the Court, for the reasons already given, it follows that this line of defence also fails.

In this trial it is incumbent for the prosecution to prove every ingredient of the case against the accused beyond reasonable doubt and that this onus never shifts. There is no burden on the accused to establish anything. He needs only to raise a reasonable doubt in the mind of the Court as to the truth of the prosecution case in order to get an acquittal.

On the evidence adduced by the prosecution before the Court I am satisfied that the prosecution had proved the charges against the accused beyond reasonable doubt. I have rejected the defence of the accused for the reasons already stated. The defence of the accused though rejected had not created any reasonable doubt in my mind as to the truth of the prosecution case. I therefore find the accused guilty as charged. However, since the two charges are framed in the alternative I would therefore find the accused guilty on the amended first principal charge only and convict him accordingly.

Also found at [1991] 3 CLJ 2188